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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 NATIONAL UNION FIRE INSURANCE
12 COMPANY, a Pennsylvania corporation,

13 Plaintiff,

14 v.

15 GREENWICH INSURANCE COMPANY, a
16 Delaware corporation,

17 Defendant.

CASE NO. C07-2065-JCC

ORDER

18 This matter comes before the Court on Plaintiff's Motion for Summary Judgment Re:
19 Recoverable Defense Costs, Bad Faith and CPA Violations ("Pl. MSJ") (Dkt. No. 68), Defendant's
20 Response (Dkt. No. 72), and Plaintiff's Reply (Dkt. No. 76); Defendant's Motion for Summary Judgment
21 Dismissal of Remaining Claims ("Def. MSJ") (Dkt. No. 67), Plaintiff's Response (Dkt. No. 73), and
22 Defendant's Reply (Dkt. No. 75). The Court has carefully considered all these documents, their
23 supporting declarations and exhibits, and the balance of relevant materials in the case file, and has
24 determined that oral argument is not necessary. The Court finds and rules as follows.

1 **I. FACTUAL BACKGROUND**

2 The parties and the Court are familiar with the facts of this case and the Court need not repeat
3 many of them here.¹ This case involves a dispute between National Union Fire Insurance Company
4 (“National Union”) and Greenwich Insurance Company (“Greenwich”) regarding the payment of
5 outstanding defense costs incurred in an underlying action that settled in the midst of trial. National Union
6 has sued Greenwich alleging that it failed to pay its portion of the costs incurred in the defense of their
7 co-insured, Harris Transportation Company (“Harris”), in the underlying *Wright* litigation.

8 In December 2006, National Union obtained an assignment of rights from both Harris, the joint
9 insured, and Williams Kastner & Gibbs (“WKG”), Harris’s defense counsel in the underlying litigation.
10 (Assignment (Dkt. No. 30-3 at 9–11).) National Union paid WKG all outstanding costs of defense in
11 exchange for an assignment of all claims from Harris and WKG. (*Id.*) In December 2007, National Union
12 filed this suit against Greenwich alleging, *inter alia*, breach of contract, bad faith, and violation of the
13 Washington Consumer Protection Act (“CPA”). (*See* Compl. (Dkt. No. 1).)

14 In October 2008, the parties filed cross-motions for summary judgment. National Union sought
15 summary judgment awarding it the defense costs incurred in the *Wright* litigation, prejudgment interest,
16 and attorney fees under the *Olympic Steamship* rule. (Dkt. No. 29.) Greenwich requested a summary
17 judgment determination on National Union’s contractual duties (Dkt. No. 26), and sought summary
18 judgment dismissal of National Union’s bad faith claims (Dkt. No. 25).

19 The Court granted National Union’s motion and denied Greenwich’s motions. (Feb. 2009 Order
20 24 (Dkt. No. 64).) In granting National Union’s motion, the Court ruled that Greenwich, as the primary
21 insurer, breached its contractual duty to defend Harris, and that National Union was entitled to
22 reimbursement from Greenwich pursuant to the parties’ allocation agreement on the costs of defense. (*Id.*
23 at 7, 17.) The Court also ruled that National Union was entitled to prejudgment interest on the

24 ¹ A detailed account of the facts is provided in the Court’s Order of February 2, 2009. (*See* Dkt.
25 No. 64 at 2–5.)

1 reimbursement, and to reasonable attorney fees. (*Id.* at 18–20.) In denying Greenwich’s motion on the
2 issue of bad faith, the Court ruled that its finding that Greenwich breached a contractual duty to defend
3 Harris raised sufficient issues of material fact on the reasonableness of Greenwich’s conduct to preclude
4 dismissal of National Union’s bad faith claim. (*Id.* at 23–22.)

5 The parties have, once again, filed cross-motions for summary judgment. National Union seeks a
6 determination, pursuant to the Court’s previous ruling, of the amount of reimbursement to which it is
7 entitled. (Pl. MSJ 1 (Dkt. No. 68).) National Union also seeks a summary judgment determination on its
8 bad faith CPA claims. (*Id.* at 2.) In light of the Court’s award of reimbursement, Greenwich requests
9 summary judgment dismissal of National Union’s remaining claims of bad faith and violation of the CPA.
10 (Def. MSJ 1 (Dkt. No. 67).) The Court will address each motion in turn.

11 **II. LEGAL STANDARD**

12 Summary judgment is proper “if the pleadings, the discovery and disclosure materials on file, and
13 any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to
14 judgment as a matter of law.” FED. R. CIV. P. 56(c). In determining whether an issue of fact exists, the
15 Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable
16 inferences in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986); *Bagdadi*
17 *v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is
18 sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at
19 248. The inquiry is “whether the evidence presents a sufficient disagreement to require submission to a
20 jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251–52. The
21 moving party bears the initial burden of showing that there is no evidence which supports an element
22 essential to the nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant
23 has met this burden, the nonmoving party then must show that there is a genuine issue for trial. *Anderson*,
24 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact,
25 “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323–24.

1 **III. ANALYSIS**

2 **A. Plaintiff's Motion for Summary Judgment**

3 National Union requests a ruling that it is entitled to recover defense costs from Greenwich in the
4 amount of \$530,760.42, which represents \$445,690.58 in costs paid to WKG and \$85,069.84 in defense
5 costs incurred on Harris's behalf and paid directly to vendors. (Pl. MSJ 1 (Dkt. No. 68).) National Union
6 also seeks a determination that Greenwich's conduct constituted bad faith and violated the CPA.² (*Id.* at
7 2.) Because the sole issue presented by Greenwich's motion for summary judgment is the remaining
8 validity of National Union's bad faith and CPA claims, the Court reserves its discussion on these issues
9 for Section III.B below, and focuses the instant discussion of Plaintiff's motion on the amount of
10 reimbursement owed by Greenwich.

11 **1. Amount Owed on WKG Invoices**

12 In its February 2009 Order, the Court ruled that the parties formed an enforceable contract
13 regarding the allocation of costs for Harris's defense. (Feb. 2009 Order 13 (Dkt. No. 64).) Under the
14 terms of that allocation agreement, Greenwich agreed to pay hourly rates of \$235/Partner,
15 \$220/Associate, and \$110/Paralegal, and National Union agreed to pay the additional costs of WKG's
16 increased billing rates and all costs required to bring WKG "up to speed." (*Id.* at 13–14.) The Court
17 further ruled, "Even if the allocation agreement were unenforceable, the principles of equitable
18 subrogation dictate allocating the defense costs according to the terms proposed by Greenwich and
19 accepted by National Union." (*Id.* at 15.) Accordingly, the Court found, as a matter of law, that "under
20 the allocation agreement and principles of equitable subrogation, . . . National Union is entitled to
21 reimbursement from Greenwich for that portion of WKG's outstanding invoices reflecting hourly billing
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23 ² In its Reply, National Union argues that the expert report of Karen Southworth, submitted by
24 Greenwich, should be stricken because she is not qualified and because her report offers impermissible
25 opinions on ultimate issues of law. (Reply 1–4 (Dkt. No. 76).) The Court finds that this issue would be
more appropriately addressed by a motion in limine, if the case were to proceed to trial. At this stage, the
Court considers the expert report, but in any event, does not find the report particularly persuasive.

1 rates of \$235/Partner, \$220/Associate, and \$110/Paralegal.” (*Id.* at 17.) However, the Court was unable
2 to fix the specific amount of reimbursement at the time of the February 2009 Order because National
3 Union did not provide sufficient documentation or calculations to support the amount it claimed is owed
4 by Greenwich under the terms of the allocation agreement. (*Id.* at 16–17 n.10.)

5 Now, in support of the instant motion, National Union provides specific documentation of the
6 defense costs it paid and the calculations for the amount owed by Greenwich under the parties’ allocation
7 agreement. (Pl. MSJ 2–4 (Dkt. No. 68).) National Union provides four invoices issued by WKG between
8 November 2005 and September 2006 for Harris’s defense. (Invoices (Dkt. Nos. 69-2–69-5).) National
9 Union also provides calculations, applying the hourly rates in the allocation agreement to each invoice, to
10 determine the remaining net invoice amount for which Greenwich is responsible. (*See id.* (Dkt. No. 69-2
11 at 1–10); Southard Decl. ¶¶ 6–10 (Dkt. No. 69 at 3–4).) In response, Greenwich does not dispute or
12 otherwise challenge National Union’s calculation of the WKG attorney fees it owes to National Union
13 under the allocation agreement. Based on the invoices issued by WKG, the relative payments made by the
14 parties, the remaining net invoice amounts, and the terms of the allocation agreement, Greenwich owed
15 \$445,690.58 in defense costs to WKG following the resolution of the *Wright* litigation. The Court
16 therefore finds that, pursuant to the allocation agreement and principles of equitable subrogation,
17 Greenwich owes National Union \$445,690.58, plus prejudgment interest.³

18 **2. Amount Owed for Additional Defense Costs Paid to Vendors**

19 In addition to the defense costs it paid to WKG, National Union requests reimbursement for
20 amounts it paid directly to various vendors that provided services for Harris’s defense. (Pl. MSJ 8–9
21 (Dkt. No. 68).) These costs were incurred for services necessary for Harris’s defense, including expert

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23 ³ For the reasons explained in the Court’s February 2009 Order, National Union is entitled to
24 prejudgment interest on the allocated portion of the defense costs owed by Greenwich, accruing since
25 December 28, 2006, the date that National Union paid WKG’s invoices in full. (Feb. Order 17–18 (Dkt.
No. 64).) Greenwich does not dispute, and the Court has no basis to doubt, National Union’s calculation
of the amount of prejudgment interest accruing on WKG invoices. (*See* Pl. MSJ 8 (Dkt. No. 68).)

1 witness services, court reporter services at depositions, medical records retrieval, trial support services,
2 and mediator services. (See Dkt. Nos. 69-7–69-9.) In total, National Union paid an additional \$85,068.84
3 in defense costs to vendors that were neither paid for by Greenwich nor billed or paid for by WKG. (Pl.
4 Reply 6–7 (Dkt. No. 76).) National Union argues that, because these vendor costs were incurred on
5 Harris’s behalf before Greenwich exhausted its obligations as the primary insurer, National Union is
6 entitled to reimbursement for these costs under the doctrine of equitable subrogation. (*Id.*)

7 As the primary insurer, Greenwich undisputedly owed a contractual duty to defend Harris and pay
8 defense costs until its policy limits were exhausted, which did not occur until it paid its share of the
9 *Wright* settlement in May 2006. See *Truck Ins. Exch. of the Farmer Ins. Group v. Century Indem. Co.*,
10 887 P.2d 455, 458 (Wash. Ct. App. 1995). On the other hand, as the excess insurer, National Union’s
11 duty to defend did not arise until Greenwich exhausted its primary policy limits. See *id.* (“An excess
12 insurer has no duty to defend until the primary insurer has exhausted its obligations”); *Rees v. Viking*
13 *Ins. Co.*, 892 P.2d 1128, 1129 (Wash. Ct. App. 1995) (“An excess carrier’s obligation to pay and defend
14 begins when, and only when, the limits of the primary insurance policy are exhausted.”). By virtue of the
15 parties’ allocation agreement, National Union became responsible for paying the costs of WKG’s
16 increased billing rate (as compared to the billing rate of prior defense counsel) and the costs required to
17 bring WKG up to speed on the file. But this agreement did not allocate, or even address, other costs
18 related to Harris’s defense not provided by WKG. Nor did the agreement relieve Greenwich of its duty to
19 defend as the primary insurer since its policy limits had not yet been exhausted. Cf. *Weyerhaeuser Co. v.*
20 *Commercial Union Ins. Co.*, 15 P.3d 115, 135 (Wash. 2000) (noting that even a “tendering of policy
21 limits does not abrogate [a primary] insurer’s duty to defend”). The mere fact that the parties formed an
22 agreement to allocate future defense costs *billed by WKG* did not abrogate Greenwich’s duty to pay for
23 other costs related to Harris’s defense. Consequently, Greenwich remained primarily responsible for
24 vendor costs related to Harris’s defense because such costs were not otherwise specifically allocated to
25 National Union under their agreement.

1 Greenwich argues that National Union cannot recover the vendor costs under equitable
2 subrogation because, according to Greenwich, “the Court has carefully considered the issue, and limited
3 [National Union’s] equitable contribution rights to the WKG attorney billing rates.” (Def. Resp. 7–8
4 (Dkt. No. 72).) Greenwich’s argument is unavailing.

5 The Court did not “limit” National Union’s equitable subrogation rights in finding that it was
6 entitled to reimbursement pursuant to the terms of the allocation agreement. Rather, the Court found that
7 the allocation agreement was an enforceable contract, the essential terms of which required Greenwich to
8 pay defense costs at a particular billing rate. (Feb. 2009 Order 13–15 (Dkt. No. 64).) The Court also
9 found that equitable subrogation provided an *independent basis* to allocate the costs of defense according
10 to the terms proposed by the parties, even if the allocation agreement was unenforceable. (*Id.* at 15.) This
11 finding did not suggest that the hourly billing rates in the allocation agreement were the *only* defense
12 costs for which Greenwich could be held liable as the *primary* insurer. Greenwich undisputedly had the
13 primary duty to defend during the time the vendor costs were incurred for Harris’s defense, and
14 therefore, such costs are properly borne by Greenwich as the primary insurer. *See Weyerhaeuser*, 15 P.3d
15 at 135 (“If an excess insurer were required to defend before exhaustion of an underlying carrier’s duty,
16 then the primary carrier would profit from its wrongful failure to defend.”) (internal quotation and
17 citation omitted).

18 Because Greenwich was primarily responsible for the costs of vendor services related to Harris’s
19 defense, and because National Union paid those costs on Harris’s behalf, the doctrine of equitable
20 subrogation entitles National Union to reimbursement for such costs. *See N.H. Indem. Co. v. Budget*
21 *Rent-A-Car Sys. Inc.*, 64 P.3d 1239, 1243 (Wash. 2003) (“[I]f a primary insurer fails to assume the
22 defense, for any reason, the secondary insurer . . . should be entitled to recoup its costs from the primary
23 insurer.”); *Truck Ins. Exch.*, 887 P.2d at 458 (“An excess insurer . . . is entitled to reimbursement for
24 costs incurred in assuming the defense.”). The Court therefore finds that National Union is entitled to
25 reimbursement of \$85,068.84, plus prejudgment interest, to recover amounts it paid to vendors that

provided services related to Harris’s defense.

B. Defendant’s Motion for Summary Judgment

Greenwich moves for summary judgment dismissal of National Union’s remaining claims for bad faith and violation of the CPA. (Def. MSJ 1 (Dkt. No. 67).) Greenwich argues that, because the Court granted National Union summary judgment on its contractual claim and awarded it contractual damages, prejudgment interest, and attorney fees, there are no remaining damages that could support its bad faith and CPA claims. (*Id.* at 6–10.)

1. Harm is an Essential Element of a Bad Faith or CPA Claim

Bad faith handling of an insurance claim is a tort analyzed under general tort principles: the existence of a duty, breach of that duty, and damages proximately caused by the breach. *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr. Inc.*, 169 P.3d 1, 8 (Wash. 2007). To prove that the insurer acted in bad faith, the insured must show the insurer’s breach was “unreasonable, frivolous, or unfounded.” *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1126 (Wash. 1998). A Washington CPA claim requires a showing of (1) an unfair or deceptive practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) which injury is causally linked to the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986). Thus, “[h]arm to the insured is an essential element of every bad faith or CPA claim.” *Werlinger v. Clarendon Nat’l Ins. Co.*, 120 P.3d 593, 595 (Wash. Ct. App. 2005); *see Van Noy v. State Farm Mut. Auto. Ins. Co.*, 983 P.2d 1129, 1135 (Wash. Ct. App. 1999) (“Without proving harm, there is no violation of the CPA or bad faith claim[.]”).

In the third-party context,⁴ harm is presumed where an insurer acts in bad faith. *Safeco Ins. Co. of*

⁴ The instant dispute involves third-party insurance coverage, which indemnifies an insured for covered claims that other third-party claimants file against her. *Dan Paulson*, 169 P.3d at 8 n.8. By contrast, first-party coverage pays specified benefits directly to the insured when a determinable contingency occurs, allowing an insured to make her own personal claim for payment against her insurer. *Id.*

1 *Am. v. Butler*, 823 P.2d 499, 506 (Wash. 1992). However, “the insurer can rebut the presumption by
2 showing by a preponderance of the evidence its acts did not harm or prejudice the insured.” *Id.*
3 “[B]ecause harm is an essential element, summary judgment in favor of the insurer is appropriate if a
4 reasonable person could conclude only that the insured suffered no harm.” *Werlinger*, 120 P.3d at 595.

5 **2. Plaintiff’s Bad Faith and CPA Claims Fail for Lack of Evidence of**
6 **Uncompensated Harm**

7 Greenwich argues that National Union has failed to establish any damages proximately caused by
8 Greenwich’s alleged bad faith or violation of the CPA that have not already been compensated by the
9 Court’s previous rulings. (Def. MSJ 4 (Dkt. No. 67).) In its motion for summary judgment, National
10 Union seeks a determination that Greenwich’s conduct constituted bad faith and violated the CPA. (Pl.
11 MSJ 2 (Dkt. No. 68).) However, even assuming that Greenwich acted in bad faith and the presumption of
12 harm applies, National Union’s bad faith and CPA claims fail as a matter of law because any damages
13 caused by Greenwich’s conduct have already been awarded to National Union, the insured’s assignee.
14 The Court need not determine whether Greenwich acted in bad faith or violated the CPA because these
15 claims otherwise fail for lack of an essential element—harm to the insured.

16 The Court has now determined that National Union is entitled to recover: (1) \$445,690.58, plus
17 prejudgment interest, which represents Greenwich’s allocated portion of the defense costs billed by WKG
18 pursuant to the parties allocation agreement; (2) \$85,068.84, plus prejudgment interest, which represents
19 other costs related to Harris’s defense that National Union paid and may recover under equitable
20 subrogation; and (3) reasonable attorney fees. In light of this award, the Court finds that there is
21 insufficient evidence of any uncompensated harm suffered by Harris, or National Union as its assignee, to
22 support a bad faith or CPA claim.

23 Where an insured has been awarded contractual damages against the insurer for failure to defend,
24 summary judgment dismissal of remaining bad faith and CPA claims is warranted absent evidence of
25 uncompensated harm to the insured. *See Ledcor Indus. Inc. v. Mut. of Enumclaw Ins. Co.*, 206 P.3d

1 1255, 1261 (Wash. Ct. App. 2009). In *Ledcor*, the trial court found that the insurer, Mutual of Enumclaw
2 (“MOE”), acted in bad faith, violated the CPA, and breached its contractual duty to defend when it failed
3 to defend Ledcor as an additional insured under its policy. 206 P.3d at 1259. The court awarded
4 contractual damages (plus prejudgment interest) for MOE’s unpaid defense obligations, but ultimately
5 declined to award any damages for bad faith or CPA violations because Ledcor had not suffered any
6 damages beyond the defense costs already awarded. *Id.* The Washington Court of Appeals affirmed on all
7 grounds, finding that Ledcor had suffered no harm from MOE’s bad faith or CPA violations. *Id.* at
8 1261–63. The court explained that emotional damages, such as the alleged “loss of peace of mind and
9 uncertainty,” were not compensable under the CPA. *Id.* at 1262. In finding that Ledcor had not been
10 harmed or prejudiced beyond the unpaid defense costs, the court emphasized that Ledcor had never lost
11 control of the case because, although MOE failed to defend it as required, Ledcor’s own insurance
12 carriers provided a competent defense and settled the matter. *Id.* at 1261, 1263. The court noted that
13 “Ledcor ultimately received what it was entitled to,” and “was at all times . . . represented by competent
14 counsel who aggressively defended Ledcor’s interests.” *Id.* at 1261. Accordingly, the court affirmed that
15 Ledcor’s damages were limited to recovery of the unpaid defense costs owed by MOE. *Id.* at 1264.

16 Here, as in *Ledcor*, the Court has already awarded damages to National Union (as Harris’s
17 assignee and subrogee) to reimburse it for the defense costs owed by Greenwich as the primary insurer.
18 And, like the insured in *Ledcor*, Harris received a competent defense throughout the litigation, even
19 though a billing dispute arose between its insurers as to who was responsible for the defense costs.
20 Despite the ongoing billing dispute, WKG continued to provide Harris with an aggressive defense and
21 managed to obtain a favorable settlement on Harris’s behalf.⁵ In addition, although Greenwich was no
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23 ⁵ Prior to the substitution of WKG as defense counsel, the plaintiffs in the underlying litigation
24 had ended an unsuccessful mediation by demanding \$6.7 million for settlement. (Claim File Notes (Dkt.
25 No. 25-2 at 63).) During the second week of trial, WKG negotiated a \$3 million settlement, which was
significantly less than the plaintiffs’ most recent demand of \$7.5 million. (*See id.*).

1 longer paying WKG's bills, it confirmed that WKG would continue to defend Harris and offered to
2 provide Harris with independent counsel to address the billing dispute. (Email string, Dec. 22, 2005,
3 through Jan. 6, 2006 (Dkt. No. 25-3 at 15–18).) The record shows that the billing dispute had no
4 appreciable impact on the adequacy of Harris's defense or the successful settlement of the case.
5 Greenwich has therefore rebutted any presumption of harm by showing the complete absence of any
6 cognizable, uncompensated harm suffered by Harris. National Union, for its part, has failed to identify
7 any actual harm to Harris.

8 Recognizing the need to establish harm to withstand summary judgment, National Union attempts
9 to identify specific harm suffered by Harris. (Pl. Resp. 9 (Dkt. No. 73).) National Union contends that
10 Greenwich's refusal to continue paying Harris's defense costs (1) placed Harris "in the awkward position
11 of having to be concerned about the continuity of its defense," (2) created "a risk that WKG would
12 withdraw from the case," and (3) caused Harris to incur "fees and costs for responding to Greenwich's
13 various discovery requests and other activities in this lawsuit." (*Id.* at 10–11.) However, none of these
14 alleged damages identified by National Union is sufficient to create a triable issue as to whether Harris
15 has suffered any cognizable "harm or prejudice" from Greenwich's conduct.

16 In light of the Court's award for reimbursement of defense costs, the mere uncertainty as to
17 whether WKG would continue representation during the billing dispute is insufficient to establish
18 cognizable harm to maintain a bad faith or CPA claim. In *Ledcor*, the court found that "loss of peace of
19 mind and uncertainty" caused by the insurer's failure to defend were insufficient to maintain a bad faith or
20 CPA claim after the insured had been awarded contractual damages. 206 P.3d at 1262–63. National
21 Union cites *Mutual of Enumclaw Insurance Co. v. Dan Paulson Construction Inc.*, 169 P.3d 1 (Wash.
22 2007), in support of its assertion that Harris has suffered cognizable harm. However, *Dan Paulson* is
23 readily distinguished from the instant case because there, unlike here, the insured "los[t] control of the
24 case" when the insurer's declaratory action interfered with the underlying arbitration by "interjecting
25 insurance coverage issues into the arbitration." *See id.* at 11–12. In *Dan Paulson*, the court emphasized

1 that “loss of control of the case is in itself prejudicial to the insured.” *Id.* (citation omitted). No such loss
2 of control occurred here. Harris maintained competent representation by WKG, which continued to
3 adequately defend it and obtained a favorable settlement in the midst of trial. *Cf. Ledcor*, 206 P.3d at
4 1261 (finding that insured never lost control of the case and did not suffer harm where it was
5 continuously represented by competent counsel). Harris’s uncertainty does not constitute sufficient harm
6 to withstand summary judgment.⁶

7 In addition, the costs incurred by Harris to comply with discovery requests in this case cannot
8 constitute “damages” in the underlying litigation to support a bad faith or CPA claim. These alleged
9 discovery damages are simply costs incurred by Harris in complying with this Court’s previous order
10 granting Greenwich’s motion to compel. (*See* Nov. 2008 Order 7 (Dkt. No. 43).) And any expenses
11 incurred by Harris in complying with Greenwich’s discovery requests are indemnified by National Union
12 by the settlement agreement in which Harris and WKG assigned their rights to National Union in
13 exchange for payment of the outstanding defense costs. (*See* Assignment (Dkt. No. 30-3 at 9–11).)

14 Because the Court has already awarded reimbursement for Greenwich’s breach of its defense
15 obligations, and because Harris “ultimately suffered no harm resulting from Greenwich’s breach of its
16 duties,” National Union’s remaining bad faith and CPA claims fail as a matter of law. *See Ledcor*, 206
17 P.3d at 1261; *see also Werlinger*, 120 P.3d at 596 (finding summary judgment dismissal of bad faith and
18 CPA claims warranted where insurer established that insured had suffered no harm). Even assuming that
19 Greenwich breached its duty of good faith, the Court has already awarded sufficient damages to provide
20 an appropriate remedy for such a breach under these circumstances. *See Ledcor*, 206 P.3d at 1261 (“The
21 remedy for insurer bad faith is compensation for the harm caused thereby and estoppel as to policy
22 defenses to the claim.”). At bottom, this case involves a dispute between an excess and primary insurer

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24 ⁶ Although this Court previously found that the billing dispute caused harm to Harris, it did so in
25 the context of finding that sufficient harm existed to support National Union’s contractual claims, for
26 which damages have now been awarded. (*See* Feb. 2009 Order 8–9 (Dkt. No. 64).)

1 over responsibility for the costs incurred in defending their co-insured, and the Court has now determined
2 the proper allocation of these costs.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court hereby finds and rules as follows:

- 5 (1) Plaintiff's Motion for Summary Judgment (Dkt. No. 68) is GRANTED IN PART AND
6 DENIED IN PART. The Court finds that National Union is entitled to recover defense
7 costs from Greenwich in the amount of \$530,760.42, which represents \$445,690.58 in
8 costs paid to WKG and \$85,069.84 in defense costs incurred on Harris's behalf and paid
9 directly to vendors. The Court declines to determine whether Greenwich's conduct
10 constituted bad faith or violated the CPA as a matter of law because these claims
11 otherwise fail for lack of an essential element—harm to the insured.
- 12 (2) Defendant's Motion for Summary Judgment (Dkt. No. 67) is GRANTED. National
13 Union's remaining claims for bad faith and violation of the CPA are DISMISSED for lack
14 of evidence of uncompensated harm suffered by the insured.
- 15 (3) The Court can discern no remaining, viable issues that would warrant a trial in this case.
16 Therefore, the Court believes the following motions are now moot: Plaintiff's Motion to
17 Disqualify Defendant's Counsel (Dkt. No. 27), Plaintiff's Motion to Quash Subpoenas
18 (Dkt. No. 51), Plaintiff's Motions in Limine (Dkt. Nos. 46 & 54), Defendant's Motions in
19 Limine (Dkt. No. 48), and Defendant's Motion to Compel Trial Attendance (Dkt. No.
20 49). The parties are directed to meet and confer within ten calendar days of this Order and
21 provide the Court with a joint status report on whether a trial is still necessary.

22 SO ORDERED this 22nd day of June, 2009.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE